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No. 83-778
IN THE

Supreme Court of the United States

October Term, 1983

FRANCES WAMBHEIM and CATHERINE HEGGELUND, indi-
vidually and on behalf of all women similarly situated,

Petitioners,

vs.

J. C. PENNEY COMPANY, INC.,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

RESPONDENT'S BRIEF IN OPPOSITION.

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Statement Required by Rule 28.1

This Brief is filed on behalf of J. C. Penney Company, Inc., which has no parent companies. All of its subsidiaries and affiliates are wholly-owned subsidiaries, except for the following companies: Sarma S.A.; J.C. Penney, G.mbH.

Question Presented.

This is a sex discrimination action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). Petitioner Frances Wambheim challenged the "relative earnings" rule of Respondent J. C. Penney Company, Inc. ("Penney") which allows an employee to enroll a spouse in the medical/dental plan if the employee earns more than the spouse. The Court of Appeals for the Ninth Circuit found no violation of Title VII. The Court found that Penney had legitimate and overriding business justifications for this rule and that the rule was not a pretext for sex discrimination.

The real issue raised by the Petition for Certiorari is whether the Court of Appeals was correct in finding legitimate and overriding business justifications for the rule. Petitioners attempt to confuse this real issue by arguing that the Court of Appeals permitted an incorrect justification of the rule and failed to follow precedent in applying the "standard of proof". Petitioners are wrong.

There is no basis for granting the Petition. The decision of the Court of Appeals is not in conflict with a decision of this Court or a decision of any other Court of Appeals and no important federal question is involved.

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J. C. PENNEY COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioners contend that Penney violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) by its practice of conditioning medical and dental benefits for an employee's spouse upon the relative earnings of the employee and the spouse. The District Court and the Court of Appeals for the Ninth Circuit found no violation.¹ *Wambheim v. J.C. Penney Co., Inc.*, 705 F.2d 1492 (9th Cir. 1983) (Appendix A to Petition).

¹Petitioner Heggelund intervened in the action only to challenge the provision denying maternity benefits to unmarried women. This challenge was not pursued on appeal to the Ninth Circuit. Additionally, the Ninth Circuit found that Petitioners did not present for review on appeal the alleged Equal Pay Act violation. Thus, these claims have been waived. Moreover, since Ms. Heggelund's claim was not appealed to the Ninth Circuit, she has no standing to petition for a writ of certiorari in this case.

A. Penney Offers a Comprehensive Benefit Package to Its Employees.

Penney offers to its eligible employees nationwide a comprehensive plan of benefits including medical and dental coverage, a pension plan, a savings and profit sharing plan, discount privileges, life insurance and a disability plan. (RT 286). All of these Penney benefit plans are offered to eligible employees without regard to their sex. (RT 289). The medical and dental plans are offered to all employees who work 20 hours or more per week. (RT 290-291). Thus, many of the part-time employees, who comprise 70% of the employees, are eligible for medical and dental coverage. In 1976, approximately 128,000 of the 184,000 total employees were eligible to be covered by the benefits package offered by Penney. (RT 291).

Employees choose to enroll in the medical and dental plans and they pay part of the cost of the plan. In 1976, approximately 78% of the eligible employees elected to participate in the medical plan. (RT 292). Approximately 55% of the eligible employees elected to participate in the dental plan. (RT 295). The contribution rates for the employees approximate 25% of the total cost of the medical and dental plans. Penney pays the remaining 75%. (RT 311). These contribution rates are the same for male and female employees. (Ex. E, ER 190). In 1981, the total cost of the medical plan was approximately \$64 million to Penney and \$21 million to the employees. (Ex. 35, ER 92).

B. The Risks Covered by the Penney Medical/Dental Insurance Plan Are Equivalent for Male and Female Employees.

The Penney medical/dental plan does not distinguish between male and female employees for the risks which it covers. For example, even prior to the Pregnancy Discrim-

ination Act of 1978, all employees have been covered under the same terms for pregnancy. (Ex. D, ER 151, 155). The relative earnings rule does not change this basic equivalency.

C. The Relative Earnings Rule Is a Legitimate Business Decision to Allocate Penney's Finite Resources in a Fair, Reasonable and Workable Manner.

Penney does not in any way condition participation in the medical and dental plans on the basis of sex. The plans are truly sex-neutral. Penney has maintained a "relative earnings" rule for spousal medical and dental coverage for the following business reasons:

(1) The intent of Penney is to allocate the finite resources available to health care in a way that will benefit the largest number of employees. Thus, benefits are available for part-time employees, 70% of whom are female employees. (RT 295, 299).

(2) Penney has decided that an employee's dependent children and an employee's unemployed or lower-earning spouse have the greatest need for dependent benefits. (RT 302-303).

(3) While employees contribute to the medical and dental plan coverage in part, Penney desires to keep the cost as low as possible so that those who need and deserve coverage can obtain it. (RT 311). Eliminating the rule might increase the employee's contribution, thereby reducing the participation of employees in the medical and dental plan.

(4) Penney does not feel a need to provide medical and dental coverage to the employees of other employers or to higher-earning spouses, who are more likely to have

insurance coverage or be able to afford it.² (RT 303).

(5) Penney's relative earnings rule does not measure immutable characteristics but rather looks at the individuals and their spouses and judges them in light of conditions they themselves can change. (RT 296, 310).

The spouses of both male and female Penney employees are eligible for inclusion in the medical/dental plan, based on the relative earnings of the employees and their spouses. The categories of eligible and ineligible spouses include both males and females.

As the District Court found and as the Court of Appeals agreed, Penney had no intent to discriminate against female employees by the adoption of the relative earnings rule. (RT 310). Penney provides all its employees the equal *opportunity* to obtain spousal coverage. If a female employee fails to qualify as head of household, the reasons for not qualifying relate to the employee's and her spouse's relative incomes and personal decisions such as whether the female employee will work full-time or part-time. For example, more females work in part-time jobs than do males and more wives stay at home and do not work than do husbands. (RT 106, 111). Penney has no control over these individual decisions.

D. The Principle of Insurance Assumes That There Will Be Disparate Effects.

Petitioners complain that the Penney medical plan provides different benefits to males than to females. Group medical insurance by its very nature has various disparities

²Mr. and Mrs. Wambheim earn approximately \$60,000 per year. Mr. Wambheim's employers have always provided medical insurance for Mr. Wambheim, Mrs. Wambheim and their children. Petitioner has not lost any money by reason of the relative earnings rule and in fact saved money by not paying the extra premium for including a spouse. (RT 55, 62, 76-77, 232; ER 56, Ex. H).

built into it. In the group insurance plan, an average rate is charged for the entire group even though various sub-groups receive greater benefits. For example, older employees receive a larger benefit than younger employees, yet the rate charged for each group is the same. (RT 206). Of course, individual employees within the sub-groups might receive dramatically different benefits even though another group actuarially would receive more. (RT 208). The use of an actuarial analysis to assess whether a disparate impact is occurring in an insurance plan is difficult since it lumps all people together for analysis even though it is clear that individual employees will have different benefits received from the plan. (RT 208).

The actuarial costs for male and female employees are different. Even so, Penney charges the same rates to male and female employees. (RT 209). For example, single males receive less actuarial benefits than single females but are charged the same contribution rate. (RT 162, 229).

Petitioners attempted to determine the actuarial benefit (not the actual benefit) received by male and female employees under the Penney medical plan. Petitioners compared the actuarial benefit for male and female employees in ten categories. In one of the ten categories, the female employee receives a lower benefit than a male employee insuring the same group of dependents. *In the remaining nine categories, the female employee receives the greater benefit compared to the male employee.* (RT 163).

Petitioners also argued that the medical benefits paid to male employees was greater than that paid to female employees.³ Petitioners *estimated* that the total cost to Penney

³In order to ensure that there was no "disparate impact" in the actuarial benefits between males and females, an employer would have to charge different employee contribution rates to males as opposed to females or control the hiring and firing of males and females according to certain risk factors which include the sex of the employee. (RT 224). Such alternatives, of course, are illegal.

for medical benefits for female employees and their dependents in one small geographical location was approximately \$496,000.00 to \$546,000.00. The corresponding estimate for male employees and their dependents was approximately \$179,000.00 to \$272,000.00. Depending upon certain assumptions, Petitioners estimated that the average cost to Penney for female employees ranged from \$432.00 to \$476.00. The corresponding average cost for male employees ranged from \$358.00 to \$544.00.

Thus, using Petitioners' own analysis, the medical plan benefits do not favor either the class of male employees or female employees who choose to enroll in the plan. Rather, the results vary depending upon certain assumptions made by the actuary.

E. The Court of Appeals Found Legitimate and Overriding Business Justifications for the Rule.

The Court of Appeals reviewed the justification of Penney for its relative earnings rule. It specifically found that the following are legitimate and overriding business justifications for the rule:

"Penney explains that the rule is designed to benefit the largest number of employees and those with the greatest need. It concluded that dependent children and spouses covered under the head-of-household rule have the greatest need for dependent coverage. Qualifying spouses are less likely to have other medical insurance. It seeks to keep the cost of the plan to its employees as low as possible, so that the needy can afford coverage. If all spouses are included, the contribution rates will increase." *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495. (Appendix A to Petition).

The Court of Appeals also found that the rule was not a pretext for sex discrimination. *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495-6. (Appendix A to Petition).

REASONS FOR DENYING THE WRIT.

The petition for a writ of certiorari should be denied for the following reasons:

(1) The decision of the Court of Appeals for the Ninth Circuit does not conflict with a decision of this Court or a decision of any other Court of Appeals. The Ninth Circuit followed legal precedent in deciding that Penney did not violate Title VII. The defense of Penney is not a cost justification defense but is a legitimate and overriding business justification defense. The Ninth Circuit also applied a standard of proof consistent with this Court's cases in this area.

(2) Petitioner is attempting to overturn the findings of fact that Penney has legitimate and overriding business justifications for its rule. No important federal question is involved in reviewing such findings.

(3) This case has no significance beyond the parties. Penney is the only major employer to provide spousal coverage in this manner.

A. The Ninth Circuit Decision Does Not Conflict With Other Decisions.

1. The Ninth Circuit Did Not Adopt a Cost Defense but Followed Precedent.

Petitioners argue that the Ninth Circuit permitted Penney to justify its rule by a cost justification defense. Petitioners are wrong. The Ninth Circuit found that Penney justified its rule with the following legitimate and overriding business considerations:

(1) The rule is designed to benefit the largest number of employees and those with the greatest need.

(2) Dependent children and spouses covered under the relative earnings rule have the greatest need for dependent coverage.

(3) Spouses qualifying under the relative earnings rule are less likely to have other medical insurance.

(4) Penney seeks to keep the cost of the plan to its employees as low as possible so that the needy can afford coverage. If all spouses are included, the employee contribution rates will increase.

The only "cost" identified by the Ninth Circuit in its list of business considerations is the cost to the employee.

The Ninth Circuit specifically rejected the argument now advanced by Petitioners as the reason for granting the writ. The Ninth Circuit stated:

"Appellants' argument that Penney's defense is an impermissible cost defense is without merit. They rely on the Supreme Court's decision in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed. 2d 657 (1978), which holds that the cost differential of providing benefits to male and female employees is not a legitimate justification for intentional discrimination between the sexes.

Manhart is not controlling here. Penney has offered legitimate and overriding business justifications for adoption of its head-of-household rule. Cost undoubtedly was a factor considered in the process, as it will be in structuring any employee benefits plan. *Manhart* does not require the conclusion that the neutral policy adopted violates Title VII, when it is justified by independent legitimate business considerations." *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495. (Appendix A to Petition).

The Ninth Circuit, therefore, found that the Penney rule was justified by legitimate and overriding business considerations, independent of cost.

The decision of the Ninth Circuit is consistent with this Court's opinions in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, ___ U.S. ___, 77 L.Ed. 2d 1236 (1983); and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, ___ U.S. ___, 77 L.Ed. 2d 89 (1983).

In *Manhart* and in *Norris*, the employers classified the employees on the basis of sex and sex alone. All women in *Manhart* paid more than men; all women in *Norris* received less benefits than men. The Court instructed that “. . . Title VII requires employers to treat their employees as *individuals*, not ‘as simply components of a racial, religious, sexual or national class’”. *Norris*, 77 L.Ed. 2d 1236, 1248. It is Petitioners' argument — that Penney's individualized objective test for need is discrimination against women — that embodies precisely such a prohibited stereotype of women.

Similarly, in *Newport News*, the employer had created an intentional gender-based distinction between male and female employees. The Court reiterated that the proper test of discrimination is whether the rule shows treatment of a person “in a manner which *but for* that person's sex would be different”. 77 L.Ed. 2d at 102.

In these three cases the employer did not have a legitimate justification for its rule or practice. Penney does. While the Supreme Court rejected the argument of the employers in these three cases that the gender-based discrimination can be justified by cost, this aspect of these cases is irrelevant to the instant action. The Ninth Circuit did not permit a justification on the basis of cost.

Moreover, Penney's rule does not measure immutable characteristics nor does it involve any gender-based classification of employees. The spouses of both male and fe-

male Penney employees are eligible for inclusion in the medical/dental plan. Conversely, both male and female spouses are subject to exclusion from the plan. Gender is thus irrelevant to inclusion or exclusion.⁴ The determining factors regarding whether individual male and female spouses are eligible relate to the individualized decisions of Penney employees and their spouses and not to the employment practices of Penney. Whether an employee, male or female, works part-time, full-time or no time is a function of decisions of the family unit, not Penney. Such career and social decisions determine whether the opportunity for coverage — available to all — will be accepted or rejected. Thus, female employees with dependents are *not* treated “in a manner which but for that person’s sex would be different”. *Newport News*, 77 L.Ed. 2d at 102. Each employee is treated as an individual. *Manhart*, *supra*; *Norris*, *supra*.

2. The Ninth Circuit Applied a Standard of Proof Consistent With Precedent.

Petitioners claim that the Ninth Circuit did not follow precedent in the burden placed on Penney to justify its relative earnings rule. Petitioners are incorrect.⁵

⁴This Court has never condemned a dependency test that actually measures the individual, such as Penney’s relative earnings rule. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Frontiero v. Richardson*, 411 U.S. 677 (1973). Impliedly, the Court would approve a true dependency test, such as Penney’s relative earnings rule, that measures the individual.

⁵Petitioners also cite EEOC Guideline 29 C.F.R. 1604.9(c). This guideline is not relevant to the issues in the Petition. The guideline merely provides that a “head of household” test is some evidence of a prima facie case of discrimination. The guideline does not, and could not, foreclose an employer from justifying its rule. The courts below considered Penney’s defense and therefore the guideline, which relates only to a prima facie case, is now irrelevant. *United States Postal Services Bd. of Gvs. v. Aikens*, ____ U.S. ____, 75 L.Ed. 2d 403 (1983). Moreover, the guideline is concerned with a test that classifies employees on the basis of sex, which Penney’s relative earnings test does not.

The Ninth Circuit stated that the burden shifted to Penney "to justify its policy". The standard used by the court was that Penney must "demonstrate that legitimate and overriding business considerations provide justification". The court used this articulation of the standard because it simply makes more sense in analyzing an insurance benefits case. Any insurance plan will have some disproportionate "impact" on males or on females; yet, all insurance plans are not discriminatory. *Manhart*, 435 U.S. 702, 710, n. 20.

The standard articulated by the Ninth Circuit is consistent with the standard adopted in prior cases. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425-435 (1975); *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The standard was articulated to apply to the facts of this case. A literal application of the "standard" suggested by Petitioners would produce absurd results. It would strike down virtually every insurance plan where actuarial benefits may be greater for females or males. Such plans are not "necessary" to the operation of a business and thus would be invalid under Petitioners' literal application of the standard. Neither Congress nor this Court would ever countenance such a result.

In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Court found that a rule that excluded applicants from employment was "job-related" and bore a "manifest relationship to the employment in question" by the employer's proof that legitimate goals "are significantly served by — even if they do not require — [the employer's] rule". 440 U.S. 568, at 587, n. 31. Similarly, Penney has legitimate and overriding business reasons to justify its rule.

Petitioners even acknowledge that the standard used by the Ninth Circuit was consistent with precedent. Petitioners state:

“The standard applied by the Court — that the policy be justified by legitimate and overriding business considerations — is based on language frequently used in selection criteria cases to emphasize the magnitude of the employer’s burden of proving business necessity . . . [T]o prove business necessity, the employer must demonstrate that it has an overriding and legitimate business purpose which is sufficiently compelling to outweigh the discriminatory impact of the practice.” [Petition, p. 18].

Thus, Petitioners concede the standard followed by the Ninth Circuit is consistent with precedent. No conflict exists with other decisions. Petitioners’ supposed conflict on the standard of proof is at most an exercise in semantics. The semantical differences in the formulation of Respondent’s burden cannot obscure the fact that the courts below weighed Petitioners’ evidence and found it wanting. Accordingly, Petitioners’ quarrel is not with the standard but with the findings reached by the Ninth Circuit.

B. Petitioners Are Seeking to Overturn Findings of Fact.

As noted, Petitioners’ true contention is not that the improper standard was applied, but that an incorrect result was reached by the Ninth Circuit. Petitioners are upset with the findings of both the District Court and the Ninth Circuit that Penney had legitimate and overriding business justifications for its rule.

A petition for writ of certiorari should not be granted to review such findings. No important federal question of law will be decided by such a review.

CONCLUSION.

Respondent requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth in this Brief.
Dated: December 15, 1983.

Respectfully submitted,

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